Supreme Court, U.S.
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No. 95-1159

In The

Supreme Court of the United States

October Term, 1995

NANSAY HAWAII, INC.,

Petitioner,

vs.

PUBLIC ACCESS SHORELINE HAWAII,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF OF THE STATE OF HAWAII AS AMICUS CURIAE IN OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether, where a private landowner's land use permit is vacated and remanded by the state courts for further proceedings so that a county planning agency may, upon a full evidentiary record, consider ways that the landowner's proposed extensive hotel, golf course, and resort complex can accommodate native Hawaiian gathering rights tracing their origins to reservations in the original land grants by the Kingdom of Hawaii, this Court lacks jurisdiction for want of a "final judgment," or, alternatively, there is no "ripe" claim for federal judicial relief, with respect to the landowner's claim that the state courts have violated substantive Due Process or inflicted a "physical occupation" taking in violation of the Just Compensation Clause?

2. Whether, even if Petitioner has presented a ripe case for this Court's review, the Supreme Court of Hawaii's preliminary guidance concerning the scope of native Hawaiian gathering rights in the context of this case constitutes a denial of substantive Due Process or an uncompensated taking of private property for public use in violation of the federal Constitution?

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INTEREST OF THE AMICUS CURIAE

Petition Nansay, Hawaii, Inc., has attacked, as a breach of substantive Due Process, and as an uncompensated judicial "taking" by "physical occupation," the Hawaii Supreme Court's construction of certain state constitutional provisions and state statutes that bear on the gathering rights of native Hawaiians – descendants of the original inhabitants of Hawaii. For this reason, the State of Hawaii has an interest in this case, and, through its Attorney General, submits this amicus curiae brief.

STATEMENT OF THE CASE

1. In response to passage of the federal Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (1991), the Hawaii legislature enacted Chapter 205A, Hawaii Revised Statutes, which declared it the policy of the State "to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii." Haw. Rev. Stat. § 205A-21 (1993). *See Mahuiki v. Planning Commission*, 65 Haw. 506, 517, 654 P.2d 874, 881 (1982). The statute achieves this purpose by delegating to each of Hawaii's four counties the tasks of (1) establishing Special Management Areas ("SMAs") along the shoreline, and (2) reviewing requests for "use permits" allowing development within an SMA. *See* Haw. Rev. Stat. §§ 205A-23, 205A-28, 205A-29 (1993). The law requires that, in consultation with the Office of State Planning (a state agency), the delegated "authority in each county . . . shall adopt rules under chapter 91[, Haw. Rev. Stat., the Hawaii Administrative Procedure Act,] setting the special management area use permit application procedures, conditions under which hearings must be held, and the time periods within which the hearing and action for special management area use permits shall occur." *Id.* § 205A-29. These rules must in turn "comply with the

objectives and policies" of Chapter 205A (*id.* § 205A-5), and no development may be permitted in the SMA unless the county "has first found," among other things, "[t]hat the development is consistent with the objectives, policies, and special management area guidelines of this chapter[.]" *Id.* § 205A-26(2)(B). The "guidelines" state that "developoment in the special management area shall be subject to reasonable terms and conditions set by the [county] authority in order to ensure . . . [a]dequate access, by dedication or other means, to publicly owned or used beaches, recreation areas, and natural reserves is provided to the extent consistent with sound conservation principles." *Id.* § 205A-26(1)(A). The guidelines also provide that the counties "shall seek to minimize, where reasonable[,] . . . [a]ny development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches, portions of rivers and streams within the special management areas and the mean high tide line where there is no beach." *Id.* § 205A-26(3)(C).

2. This case arises out of the interaction of the Big Island of Hawaii's ("Hawaii County's") specific procedures for adjudicating SMA use permit requests and the "contested case" provisions of the Hawaii Administrative Procedure Act, Haw. Rev. Stat. §§ 91-1(5), 91-9 - 15 (1993). These latter provisions, which specify the contours of trial-type administrative process in Hawaii,[1] are

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[1] In a Chapter 91 "contested case," participants are entitled to specific notice and opportunity to be heard (Haw. Rev. Stat. § 91-9 (1993)), and to submit evidence and to cross-examine opposing witnesses (*id.* § 91-10). Among other things, state law also prohibits an agency deciding a contested case from considering matters outside the administrative hearing record (*id.* § 91-9(g)), and an agency decision must be backed by findings of fact and conclusions of law that are in turn subject to judicial review in the courts (*id.* §§ 91-12, 91-14, 91-15).

triggered under state law by administrative action "in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." *Id.* § 91-1(5). Contested case hearings can be triggered under state law either by the state or federal Constitution's requirements of procedural Due Process, *see Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 496, 498, 522 P.2d 1255, 1265, 1268 (1974), or by statutes or administrative rules that provide for administrative hearings. *See Pele Defense Fund v. Puna Geothermal Venture*, 77 Haw. 64, 68, 881 P.2d 1210, 1214 (1994). In this case, the state court below construed the local administrative rules of Hawaii County to have conferred hearing rights for all parties with minimal "injury-in-fact" standing when a landowner has applied for an SMA permit. *Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n*, 79 Haw. 435, 432, 903 P.2d 1246, 1253 (1993) ("*PASH II*") (citing cases).

3. In assessing the requirement of "standing," the Hawaii Supreme Court, like this Court, has recognized aesthetic and environmental interests as generally sufficient to confer the ability to challenge land development actions; conversely, the determination that a party has bare "injury-in-fact" standing does not signify that that party has any "property" interest in the land at issue.[2] As

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[2] *Compare Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 90, 734 P.2d 161, 167 (1987) ("[I]f the development . . . could result in the loss of access routes to the shoreline or the right to traverse ancient trails, the association's members probably were 'specially, personally and adversely affected' by the administrative decision"), *with Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) ("[U]nder our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even

confirmed by County rule, standing to participate in an SMA permit proceeding – and the right to demand trial-type procedures – is conferred upon any entity that "can demonstrate that [it] will be so directly and immediately affected by the Commission's decision [that its] interest in the proceeding is clearly distinguishable from that of the general public[.]" Haw. County Admin. R. § 4-2(6). *See Public Access Shoreline Hawaii v. Hawaii Planning Commission*, 79 Haw. 246, 250 n.6, 900 P.2d 1313, 1317 n.6 (App. 1993) ("*PASH I*").

4. In 1990, Petitioner Nansay Hawaii, Inc., applied to the Hawaii County Planning Commission for an SMA use permit to allow Nansay to build an extensive resort complex along the Kona coast consisting of two hotels containing more than 1000 guest rooms, a golf course and clubhouse, in addition to more than seven hundred multiple family or single-family residential units, as well as restaurants, retail shops, an artisan village, and a child care center. *PASH II*, 79 Haw. at 429, 903 P.2d at 1250. The proposed development encompasses more than 450 acres of ecologically and culturally important shoreline area within the SMA on the Big Island. *Id.* Despite these facts, Nansay sought to have its application processed without the protection afforded to interested parties by a contested case proceeding. *Id.* Some individuals, members of Respondent Public Access Shoreline Hawaii ("PASH"), were permitted to adduce evidence of their standing, and testified under oath in opposition to aspects of the proposed development, including its possible effect on tidally-influenced anchialine ponds at Kohanaiki. *PASH I*, 79 Haw. at 251, 900 P.2d at 1318. In this context, PASH's

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though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.")

spokesmen and member witnesses attempted to show that PASH had standing to request a trial-type hearing as a result of the potential rights that certain PASH members enjoyed as native Hawaiians to gather shrimp from the anchialine ponds to use as bait for subsistence fishing purposes. *Id. See also* Record on Appeal at 1156 (Rothstein testimony: "native Hawaiian fishing and food gathering rights" are matters on which "our members are directly impacted," and that "our members have been engaged in" the "harvesting, maintaining from those ponds" "for decades"). The Commission found, however, that PASH did not have standing, and summarily granted the permit. *PASH II*, 79 Haw. at 430, 903 P.2d at 1250.

5. The claims PASH invoked to distinguish its interest in the permit proceeding derive from unique aspects of Hawaiian land law. As this Court is aware, allodial (non-feudal) title was distributed in Hawaii by King Kamehameha III "during the Great Mahele or royal land division." *Kaiser Aetna v. United States*, 444 U.S. 164, 167 (1980). Under laws authorizing that division, private title did not carry the "full bundle" of rights given with fee simple title under English common law. In particular, the *Principles Adopted by the Board of Commissioners to Quiet Land Title in Their Adjudication of Claims Presented to Them*, Stat. L. Kamehameha III 81 *et seq., reprinted in* II Rev. L. Haw. (1925) (App. 2124 *et seq.*) (*"Land Commission principles"*) state:

> The whole power of the King to confer and convey lands to which private equitable claim now attaches, is reposed in the Commission. What is the nature and extent of that power which the King has bestowed upon this board? It can be no other than his private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of

> the nation. Among these prerogatives which affect lands, are the following:
>
> . . . 3rd. To encourage and even to enforce the usufruct of lands for the common good.
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> . . .
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> These prerogatives, powers and duties, His Majesty ought not, and ergo, he cannot surrender. Hence the following confirmations of the board, and the titles consequent upon them must be understood subject to these conditions.

Stat. L. Kamehameha III at 81-84. Under state law, the power "[t]o encourage and even to enforce the usufruct of lands for the common good" is a broad grant that "reserve[d] to the sovereign the right to regulate and allocate water [and other] resources in accord with the needs of the people of the Kingdom." *Reppun v. Board of Water Supply*, 65 Haw. 531, 544, 656 P.2d 56, 66 (1982); *see also Robinson v. Ariyoshi*, 65 Haw. 641, 675, 658 P.2d 287, 311 (1982). Another law, codified at Haw. Rev. Stat. § 1-1 (1993), and which dates to the Hawaiian monarchy, provides that "[t]he common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage." This law, for many years prior to this case (and, so far as the record shows, prior to Nansay's purchase of its property), had formed the basis for claims of gathering rights, either under principles of English "custom," or under precepts of "Hawaiian judicial precedent" or "Hawaiian usage." *See Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982). It has also been the settled law that ocean-based Hawaiian "fishing rights" (including the incidents necessary to exercise those rights, such as the gathering of bait here) were excepted from "fee

simple" title. *Oni v. Meek*, 2 Haw. 87, 95 (1858) (preemption of "specific" gathering rights not codified in Haw. Rev. Stat. § 7-1 inapplicable to "fishing rights").

6. On PASH's appeal to the state courts, the claims – even though not reduced to a judgment – of Respondent's members were deemed sufficient to distinguish PASH from the public as a whole, and were therefore held to be sufficient to require a contested case hearing. *See PASH I*, 79 Haw. at 253, 900 P.2d at 1320; *PASH II*, 79 Haw. at 452, 903 P.2d at 1273. Nine different state judges, without dissent, rejected Nansay's claim that its permit should be upheld, the supreme court finding it critical that Nansay's and the County's refusal to hold a trial-type hearing "effectively curtailed PASH from developing a complete record" as to the scope of the conditions to be placed upon the permit. *PASH II*, 79 Haw. at 448 n.39, 903 P.2d at 1269 n.39.

7. In its opinion, the Supreme Court of Hawaii also clarified the duty of the Commission on remand. The Court noted that Article XII, § 7 of the Hawaii Constitution provides that "[t]he State . . . shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a[3] tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights." *PASH II*, 79 Haw. at 437, 903 P.2d at 1258. But this mandate, the Court found, warranted "protection" of Hawaiian gathering rights only "to the extent feasible," and only so long as Nansay was not subject to " 'actual harm.' " *Id.* at 450 n.43, 903 P.2d at 1271 n.43 (quoting

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[3] An "ahupuaa" is a unit of land generally running from the mountains to the sea, and constituted the general type of land unit awarded in the Great Mahele. *Kaiser Aetna*, 444 U.S. at 167.

Kalipi, supra, 66 Haw. at 12, 656 P.2d at 752). The Court also stressed that only "non-confrontational aspects of traditional Hawaiian culture" would be entitled to protection, *id.* at 447, 903 P.2d at 1268, and that "rights of access and collection will not necessarily prevent landowners from developing their lands." *Id.* at 450, 903 P.2d at 1271.

8. Against this background, the Supreme Court of Hawaii also provided guidance to the County Commission on a number of unresolved issues bearing on gathering rights. The Court began with its 1982 decision in *Kalipi v. Hawaiian Trust Co.,* 66 Haw. 1, 656 P.2d 745 (1982), which had held, based on specific concessions made by the Plaintiff in that case, that there was " 'an insufficient basis' " in the record there " 'to find that [particular gathering] rights would, or should, accrue to persons who did not reside within the ahupuaa [land district] in which such rights are claimed.' " *PASH II,* 79 Haw. at 439, 903 P.2d at 1260. The Court below pointed to *Kalipi's* broad language to the effect that "[t]he precise nature and scope of the rights retained by § 1-1 would, of course, depend upon the particular circumstances of each case," 66 Haw. at 12, 656 P.2d at 749-50, and noted that, in a case decided a decade after *Kalipi,* the Court had held that native Hawaiian litigants should be permitted to litigate fact-specific claims of customary gathering rights, based on unique evidence of gathering practices in a particular district. *PASH II,* 79 Haw. at 439-40, 903 P.2d at 1250-61 (discussing *Pele Defense Fund v. Paty,* 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied,* 113 S. Ct. 1277 (1993)). Clarifying its earlier decision in *Oni v. Meek,* 2 Haw. 87 (1858), the Court also held that native Hawaiian litigants should not be foreclosed from establishing, through evidence, traditional and customary practices, and the reasonable exercise thereof, simply because *Oni* had

"rejected one particular claim [the right to pasture horses] based upon an apparently non-traditional practice that had not achieved customary status in the area where the right was asserted." *Id.* at 441, 903 P.2d at 1262. Relying on the *Land Commission Principles*, and the rights preserved by § 1-1, the Court resolved conflicts in prior case law concerning the scope of Hawaiian custom, and held that Hawaiian gathering rights were "sovereign" in nature, and may be asserted "notwithstanding arguable abandonment of a particular site[.]" *Id.* at 450, 903 P.2d at 1270.

9. Although the Court provided this guidance, it stressed that, if a customary right has been factually proved, "access is only *guaranteed* in connection with undeveloped lands," state law "does not *require* the preservation of such lands[.]" 79 Haw. at 451, 903 P.2d at 1272. The mandate below thus means only that "the State," via the County, "does not have the unfettered discretion to regulate the rights of ahupua'a tenants out of existence." *Id.* Nansay was expressly allowed on remand to challenge any and all of PASH's fact-based contentions as to customary usage. *Id.* at 448 n.39, 903 P.2d at 1269 n.39. On this basis the court rejected Nansay's claims that the interlocutory mandate constituted a "judicial" or "regulatory" taking. *Id.* at 451-52, 903 P.2d at 1272-73.

REASONS FOR DENYING THE WRIT

Nansay's Petition does not adduce any "compelling reasons" that justify expenditure of this Court's scarce resources, and should be denied. *See* S. Ct. R. 10. None of the issues presented is ripe, except for perhaps a pure and totally meritless "facial" challenge to an interlocutory order of a state court – an attack that faces "an uphill battle" on an "especially steep" slope. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 495

(1987). *See also United States v. Salerno*, 481 U.S. 739, 745 (1987). That slope is even steeper, as Nansay's claims, which involve the use of tidally-influenced anchialine ponds along Hawaii's shoreline, are controlled by *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988), which, as a federal matter, allocates power in this context unequivocally to the States under the Equal Footing Doctrine. Nansay has given no reason to revisit *Phillips*, nor a single good reason why the state courts' efforts to work through difficult problems of local law should be subject to review in this case. Given this case's posture, moreover, Nansay's federal claims, if granted, would wrongly have this Court *encourage* state courts to generate "procedural injustice" by summarily terminating native rights claims at the behest of private landowners. *Compare Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1336 (1994) (Scalia, J., joined by O'Connor, J., dissenting from the denial of review).

A. Nansay's Claims are Not Ripe for Review in this Court.

Section 1257 of Title 28 limits this Court's power to review only "final judgments or decrees" of the state courts of last resort. This limit is especially important when a Petitioner alleges that a state court ruling has "taken" its property for public use without just compensation, or acted in breach of substantive Due Process. For nearly twenty years,[4] this Court has routinely turned

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[4] *See Dolan v. City of Tigard*, 114 S. Ct. 2309, 2315 n.4 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1010-14 & nn.3-4 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 526-32 (1992); *Pennell v. City of San Jose*, 485 U.S. 1, 9-14 (1988); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 311-12 (1987); *FCC v. Florida Power Corp.*, 480 U.S. 245, 250-53 (1987); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340-351 (1986); *Williamson County Regional Planning*

away litigants making such claims when further administrative or judicial proceedings remain to be had, and the state entities (here the state courts) alleged to be responsible for the asserted "taking" or "due process" deprivation have not yet "arrived at a final, definitive position regarding how [they] will apply the [law] at issue to the particular land in question." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 191 (1985). Indeed, this Court, in 1986, summarily directed the United States Court of Appeals for the Ninth Circuit to reconsider a federal decree striking down certain features of Hawaii state court judgments arising out of similar interpretations, in the context of private rights to fresh surface water, of the very *Land Commission Principles* at issue in this case. *See Ariyoshi v. Robinson*, 477 U.S. 902 (1986), *action dismissed on remand*, 887 F.2d 215 (9th Cir. 1989). Although such a summary disposition does not bind the Court as fully as an opinion issued after plenary review, the fact that granting the Petition here would sharply conflict with this Court's own action in a highly analogous case from Hawaii is a factor that counsels strongly against granting review.[5]

Comm'n v. Hamilton Bank, 473 U.S. 172-190 (1985); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 631-32 & n.12 (1981); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 112-15 & n.13, 137-38 & n.34 (1978).

[5] In the *Robinson* litigation, the Ninth Circuit Court of Appeals held that there is no basis for federal jurisdiction of any kind to assert a taking or substantive Due Process claim when, in a proceeding in the nature of a quiet-title action, the state courts have yet to render a "final judgment," with "the certainty of res judicata, or the effect of collateral estoppel," actually apportioning the property at issue. 887 F.2d at 219. The Ninth Circuit so ruled even though assertedly revolutionary rulings of the state court "would bind lower courts in future litigation," and "placed a cloud on the title of the various private owners."

Petitioner concedes, as it did below, that the finality doctrine prohibits review of any claim that the Hawaii Supreme Court has inflicted a "regulatory taking," but asserts review should still be granted because Petitioner has made a "judicial taking" and a "physical occupation" claim. Neither claim raises any convincing, let alone, compelling reason for granting review.

First, even if state courts could *ever* be deemed to "take" property for public use by declaring the law in property cases, there is no reason to treat such claims of "judicial" taking with greater solicitude – and a less stringent ripeness requirement – than claims that attack "regulatory" actions of nonjudicial officials. Indeed, to accept Nansay's approach would turn the precepts of federalism and respect for the state courts on their head. It therefore must be the law that the same ripeness rules that bar Petitioner's regulatory taking claim also bar Nansay's claim of "judicial" taking. Because Nansay concedes it may "not present here" "a regulatory takings claim" (Pet. at 25 n.13), it follows that, at a minimum, the effects of the state supreme court's guidance concerning the effect of native Hawaiian gathering rights on the development conditions that may be inserted into Nansay's SMA use permit are not properly on review here.

Indeed, Nansay's invocation of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), only confirms this. In *Lucas*, the Court held that state regulation "that deprives land of all economically beneficial use" cannot

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Id. Rather than resolve a conflict in the courts, the instant Petition seeks to create conflict on the federal ripeness requirement – one which is itself highly dependent on state law analysis. Even before considering whether there has been colorable disobedience of federal law by the state supreme court below, the Court should view the agreement of the Supreme Court of Hawaii, and the Ninth Circuit, on the requirements for a justiciable controversy in this context, as a factor strongly weighing against certiorari.

be sustained under the Taking Clause, without the payment of compensation, merely by an " *'ipse dixit'* " to the effect that what previously was " 'private property' " is now " 'public.' " *Id.* at 1031 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)). Yet, even assuming, arguendo, that (1) this language applies to "judicial taking" claims; (2) Nansay has shown an *"ipse dixit"*; and (3) Nansay has also shown a deprivation of "all economically beneficial use" of its land (none of which assumptions hold true), *Lucas* confirms that a litigant must have "obtained a final decision regarding how [he] will be allowed to develop [his] property," before he is "entitled to a definitive adjudication of his takings claim in this Court." *Id.* at 1011 (quoting *Williamson County*, 473 U.S. at 190). If the "judicial taking" theory is a valid constitutional basis at all for challenging state court decisions elaborating state law rules of property, *Williamson County* applies in full force to claims made under that theory. And here, of course, far from "shrugg[ing] off the possibility of further administrative and trial proceedings," *Lucas*, 505 U.S. at 1011, the state courts have granted Nansay every opportunity to show that it would be "harmed" by including certain gathering rights in its SMA permit, or, more important, that PASH's claims are factually baseless to begin with.

Nor can Nansay urge there has been a "temporary" taking of its land. For it is the essence of the *Williamson County* ripeness doctrine that delays in obtaining development permits due to a landowner's failure to comply with existing procedural mandates are not takings, but, rather, are the "inevitable cost of doing business in a highly regulated society." 473 U.S. at 204 (Stevens, J., concurring in the judgment). A ripe case is not shown by mere complaints of "expense and disruption," and "protracted adjudicatory proceedings," *FTC v. Standard Oil Co.*, 449 U.S. 232, 243-44 (1980), *cited with approval*, *Williamson County*, 473 U.S. at 192. Nansay does not, and cannot, say that its applications for protection against

native gatherers "would be futile[.]" *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353 n.8 (1986). Rather, "a meaningful application [by Nansay] has yet to be made." *Id.*

Nansay does not deny that it has correctly been adjudicated to have wrongly attempted to expedite its permit application through a flawed procedure, "except to the extent Public Access's purported standing is based on its members having legal interests in Nansay's land as a result of the Supreme Court's opinion." Pet. at 10-11. The answer here is that the opinion in *PASH II* does not give – at least not without further proceedings – any new present (or future) posessory interests in the land at issue. As the Ninth Circuit has held in construing *PASH II* in a related context, "the Hawaiian Usage clause does not support the proposition that native tenants possess exclusive use and occupancy rights over kuleana lands they failed to claim." *Pai 'Ohana v. United States*, No. 95-15202 (9th Cir. Feb. 2, 1996). In fact, *PASH II* holds only that customary rights in Hawaii are factual in nature, and PASH has the right to adduce the pertinent facts. Rather than create a ripe issue Nansay may invoke, the decision below simply avoids the "procedural injustice" that would have accrued against PASH had its members' claims been terminated without a full hearing. There is no basis for finding fault with that. *See Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1336 (1994) (Scalia, J., joined by O'Connor J., dissenting from denial of review). *See generally Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (arbitrary termination of statutory claim).

Nansay also argues that review should be granted because it "must suffer the now permanent entrance onto and occupation of its property of an enlarged class of native Hawaiian gatherers," and, hence, there has been ordered an uncompensated physical occupation of its land. Pet. at 25 n.13. This is not so. Not only is any "occupation" by native gatherers at worst only temporary in nature; it is an occupation that Nansay itself caused by

failing to comply with state procedure. Nansay has never been barred from precipitating a ripe decision from the Planning Commission; nor, more importantly, has Nansay ever been barred from initiating a trespass or ejectment action in the state courts, in which the unadjudicated factual claims of custom could be decided in advance of a Commission ruling. Nansay, in many fora, could put PASH to its proof, and assert alternatively that it is "harmed" by PASH's access (say, by a depression in land value), or that PASH's prima facie claim is groundless. Nansay could also invoke recognized state-law defenses to the assertion of rights arising out of the *Land Commission Principles*. These include the defenses of "public use" (*i.e.*, that the interference with Nansay's interest is preventing job creation, resource preservation, or other public good), "laches" (*i.e.*, long and prejudicial delay in assertion of the "usufruct" of the land), and "estoppel" (*i.e.*, "manifest injustice" would be perpetrated by assertion of the public right at this time). *See Reppun v. Board of Water Supply*, 65 Haw. 531, 557 & n.18, 560 & nn. 20-22, 562 & n.24, 656 P.2d 56, 74 & n.18, 76 & nn. 10-22, 77 & n.24 (1982). In light of these defenses, even if what Nansay argues about Hawaiian property law is true, there has been no one, let alone an "expanded class" of native gatherers, issued "a government license" to intrude upon Nansay's claimed land. *See Yee v. City of Escondido*, 503 U.S. 519, 532 (1992). Nansay's "physical occupation" claim, and its contention that this case "is analytically indistinguishable from *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987)" (Pet. at 23), is accordingly without merit. *See Nollan*, 483 U.S. at 832 & n.1.

In short, Nansay's claims are ripe only if this Court wished to indulge broad facial attacks on general state-law property doctrines that may have no effect at all when, on remand, relief for one party or another is ordered. Nothing in this Court's jurisprudence, recent or otherwise, suggests any member of this Court shares – or should share – this desire. Here, Nansay "must establish

that no set of circumstances exists under which the [opinion below] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Given Nansay's options, this test cannot be met. Indeed, even if Nansay has been prejudiced by the "law of the case," there are simply "too many 'ifs' " surrounding its claims to warrant review. *California v. Rooney*, 483 U.S. 307, 313 (1987) (per curiam). This Court "cannot know the extent of the injury suffered" by Nansay as a result of the judgment below; there is no ripe claim. *See Robinson v. Ariyoshi*, 887 F.2d 215, 218 (9th Cir. 1989). Review should thus be denied.

B. Even if Petitioner Somehow Stated a Ripe Federal Claim, The Supreme Court of Hawaii's Articulation of General Rules Governing Native Hawaiian Gathering Rights is Well Within Any Conceivable Formulation of the State Courts' Authority to Resolve Difficult and Unique Questions of Property Law.

Focusing mainly on two asserted "changes made by the *PASH* court" to the contours of native Hawaiian gathering rights, Nansay asserts that "the custom doctrine has been distorted in Hawaii out of all reasonable juridical recognition." Pet. at 14. This assertion is simply false. There is no basis for review.

First, Nansay's claims fail given *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988), which held that every State upon entering the union takes "title to lands lying under waters that [are] influenced by the tide," regardless whether such waters are "navigable in fact." *Id.* at 472. This case is indisputably about tidally influenced lands, which were conveyed to Hawaii upon statehood. *See* Pub. L. 86-3, 73 Stat. 4 (Mar. 18, 1959). And, as this Court has made clear, how particular facts "would transfer ownership of these lands from the State to petitioners is a question of state law." 484 U.S. at 484. State court power to define local law is at its height in this case. *See PASH II*, 79 Haw. at 436 n.20, 903 P.2d at 1257 n.20.

Second, Nansay's theory, if accepted by this Court, would go well beyond any arguable basis for limiting state court authority to define "property," and would make a whole range of accepted judicial methods unconstitutional. For example, Nansay's attack on the asserted "expansion" of Hawaiian customary rights to those who do not actually own land within a particular land district flows from an interpretation of the *Kalipi* opinion that ignores both that that opinion arose out of particular concessions made by the plaintiff there, and the fact that such ownership-based requirements are at odds with the requirement of custom as a general matter. *Kalipi*, as noted above, was very clear that claims of native Hawaiian gathering rights "would, of course, depend upon the particular circumstances of each case," 66 Haw. at 12, 656 P.2d at 749-50, and that fact should end any claim of judicial taking. Indeed, at worst, the Hawaii Supreme Court's earlier cases "had indicated a tentative quality in [their] pronouncements," and clarification of the law, even limiting past cases to their facts, plainly "rest[s] on a fair and substantial basis." *Demorest v. City Bank*, 321 U.S. 36, 43 (1942).

Even less persuasive is Nansay's argument that *Kalipi*'s *dicta* concerning the scope on gathering rights on developed land, bound the state courts to enshrine, as an inalterable "rule of property," the idea that landowners, in the face of gathering rights, had a vested right to "destroy gatherable items," or "develop their land" "with impunity" (Pet. at 25). As the Hawaii courts held here, *see PASH I*, 79 Haw. at 253, 900 P.2d at 1320, no court decision had addressed a case actually involving the interaction of the "right to gather" and the "right to develop," and, hence, nothing in *PASH II* actually "overrule[d] any holding of th[e Hawaii Supreme] Court." *Sandin v. Conner*, 115 S. Ct. 2293, 2300 n.5 (1995). At worst, Nansay attacks "abandonment" of a particular "methodology" – a process that is well accepted in the law when new cases

indicate that the Court "has strayed from the real concerns" of past cases. *Id.* at 2300 & n.5. *Cf. Lucas*, 505 U.S. at 1031 (noting "changed circumstances or new knowledge may [even] make what was previously permissible no longer so").

Even if this Court might be prepared some day to recognize the doctrine of "judicial taking" set out in Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring), there are no good reasons to do so in this case. Here, the Hawaii Supreme Court was well aware of Nansay's theory, and held that the mere "recognition" of certain general principles governing gathering claims did not, in and of itself, amount to a "judicial taking." *PASH II*, 79 Haw. at 451, 903 P.2d at 1272. This Court's Rule 10 admonishes that "certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law." Under Nansay's own theory, only such a "misapplication" is at issue.

This Court should also be reluctant to grant review given the harm that could be inflicted by an uninformed resolution of the "judicial taking" issue. As this Court said 65 years ago:

> The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guarantees, even though parties may have acted to their prejudice on the faith of the earlier decisions.

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 681 n.8 (1930). Judicial "legislation" was a concept foreign to the Framers, who would have viewed it odd that courts

could be held to "take" property by construing statutes upon which the system of property came into being. *See Linkletter v. Walker*, 381 U.S. 618, 622-23 (1965). Judicial decisions in property law, as elsewhere, are presumed to "operate retrospectively." *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982). The protection against judicial changes in property law is not a "just compensation" suit, but title insurance. *See* Brown, *Insured Legal Opinions*, 1961 Ins. L.J. 712. "Mistaken applications of the law are inevitable, but no principle of constitutional law requires compensation for every mistake." *In re Chicago, Milwaukee, St. Paul & Pacific Railway*, 799 F.2d 317, 327 (7th Cir. 1986). *See also Corporation of the Presiding Bishop v. Hodel*, 637 F. Supp. 1398, 1407 (D.D.C. 1986), *aff'd*, 830 F.2d 374 (D.C. Cir. 1987).

To date, although sporadic mention has been made in court decisions of the "judicial taking" theory, no federal court of appeals or state court of last resort has ever ultimately invalidated a state court decision as a "judicial taking." There is thus no conflict even in approach between the decision below and any of the appellate courts that have spoken on this issue. That fact demonstrates that, in general, and in the instant case, state judges have taken seriously their duty to "enforce the supreme law of the land." *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 & n.1 (1985). If this Court does address the "judicial taking" issue anew at the behest of a private litigant who has lost a property case, it should only be where the aggrieved landowner has presented a truly compelling argument that review will result in the correction of the state court. Nansay has failed to do so, and, in the end, its petition both flies in the face of precepts of federalism, and wrongly "denigrates the judges who serve on the state courts." *Id.*[6]

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[6] Petitioner asserts that "[t]wo" of the Supreme Court of Hawaii's decisions concerning Hawaiian land tenure have been "successfully challenged" under the "judicial takings" theory

CONCLUSION

For the reasons above, the petition should be denied.

Dated: Honolulu, Hawaii, March 21, 1996.

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presented in this case. Pet. at 22 n.12. This statement is in part totally false, and in part a half truth. The judgment in *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1977), was ultimately vacated by this Court, *see* 477 U.S. 902 (1986), and reversed by the Ninth Circuit, *see* 887 F.2d 215 (9th Cir. 1989), *attorneys' fee award also reversed*, 933 F.2d 781 (9th Cir. 1991). Although the District Court's judgment in *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Haw. 1978), was not reversed or vacated, that result is attributable to the defendants' failure to timely appeal. 679 F.2d 152 (9th Cir. 1982). Petitioner does not contend that *Sotomura* is preclusive of the issue here, nor could it be. *See United States v. Mendoza*, 464 U.S. 154 (1984).